

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NATHAN LAMAR PETERSON,

Defendant-Appellant.

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UNPUBLISHED

January 18, 2005

No. 250902

Wayne Circuit Court

LC No. 03-004301-01

Before: Gage, P.J., and Meter and Hood, JJ.

PER CURIAM.

Defendant was convicted of assault with intent to commit great bodily harm less than murder, MCL 750.84, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to four to ten years in prison for the assault conviction and to two years in prison for the felony-firearm conviction. He appeals as of right. We affirm.

On appeal, defendant claims that he was denied his constitutional right to the effective assistance of counsel. We disagree. When reviewing a claim of ineffective assistance of counsel, this Court reviews the trial court's factual findings for clear error and reviews the trial court's constitutional determinations de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002); *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

Defendant argues that his counsel was ineffective in failing to file an alibi defense in a timely manner, waiving defendant's appearance at a critical hearing, failing to present critical witnesses, inadequately cross-examining or impeaching the prosecution's witnesses, failing to secure a copy of a transcript of a critical witness in a codefendant's trial, failing to subpoena witnesses, and failing to prepare adequately for trial.

To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness and (2) that there is a reasonable probability that, but for counsel's error or errors, the result of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). To show that counsel's performance was below an objective standard of reasonableness, a defendant must overcome "the strong presumption that his counsel's action constituted sound trial strategy under the circumstances." *Id.* at 302. "Counsel's failure to call witnesses is presumed to be trial strategy[.]" *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997). Counsel's

performance must be measured without the benefit of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

Here, Charon Cabrera, the purported alibi witness, was unsure of her dates and could not account for defendant's whereabouts after a certain period of time. Furthermore, defendant told his trial counsel, David Roby, that he was at the scene. Therefore, Roby could not put Cabrera on the stand to testify as an alibi witness. See *LaVearn*, *supra* at 215. Because Cabrera could not testify, defendant did not want to testify, and no other witnesses could have provided an effective alibi because counsel knew that defendant was at the scene when the shooting occurred, defendant was not denied the effective assistance of counsel due to Roby's failure to file a notice of alibi. *Id.*; *People v McMillan*, 213 Mich App 134, 141; 539 NW2d 553 (1995) (holding that the failure to file a notice of alibi does not constitute ineffective assistance of counsel if counsel believes that the purported alibi witness could not provide an effective alibi).

Counsel's failure to call Cabrera or other witnesses is presumed to be trial strategy. *Mitchell*, *supra* at 163. Because defendant has done nothing to rebut this presumption, his claim that he was denied the effective assistance of counsel because Roby failed to subpoena witnesses and to present critical witness testimony must fail.

Furthermore, defendant's claims that he was denied the effective assistance of counsel because Roby inadequately cross-examined the prosecution's witnesses, failed to secure a copy of witness Darryl Clinkscales' testimony from codefendant Curtis Wade's trial, and failed to adequately prepare for trial must all fail because defendant has failed to show that Roby's performance was below an objective standard of reasonableness.

Roby's efforts in attempting to obtain all the transcripts from Wade's trial were adequate given the circumstances. Roby requested the transcripts from Wade's trial and obtained an order to acquire them for use in defendant's trial. Only one of the three transcripts could be produced before trial. Roby was told that two transcripts could not be located because the transcripts were prepared by a substitute court reporter that had health problems and had retired. The transcript that Roby did receive contained most of victim Steven Weems' testimony from Wade's trial and was used extensively by Roby to impeach Weems' testimony at defendant's trial. Roby did not ask for assistance from the trial court in obtaining the missing transcripts from Wade's trial because he did not want to alert the court and the prosecution to the value of Clinkscales' testimony. Because Roby made efforts that a reasonable attorney would make to acquire the appropriate transcripts, and, furthermore, identified his trial strategy for not making further efforts to obtain them, it cannot be found that defendant was denied the effective assistance of counsel by Roby's failure to obtain all the transcripts from Wade's trial.

Roby's efforts to cross-examine the prosecution's witnesses were adequate. Roby made sufficient efforts to obtain Clinkscales' previous testimony. Roby stated that when he later did get a chance to read Clinkscales' previous testimony, he determined that the testimony would not have been helpful in impeaching Clinkscales' testimony on the central issues. Furthermore, because Roby made extensive efforts to impeach Weems' testimony through cross-examination, it cannot be found that defendant was denied the effective assistance of counsel on the grounds of a failure by Roby to adequately cross-examine or impeach the prosecution's witnesses.

Additionally, Roby adequately prepared for trial. When claiming ineffective assistance due to defense counsel's unpreparedness, a defendant must show prejudice resulting from the lack of preparation. The failure to interview witnesses does not alone establish inadequate preparation. *People v Caballero*, 184 Mich App 636, 640, 642; 459 NW2d 80 (1990). Counsel's lack of experience does not alone establish ineffective assistance. *People v Kevorkian*, 248 Mich App 373, 415; 639 NW2d 291 (2001).

Here, Roby met with defendant on several occasions to discuss strategy; the meetings included five visits to prison, even though Roby was only paid for two visits. Roby found Hall to testify. He reviewed Wade's case and obtained an order for the transcripts to be produced. He spoke with defendant's mother and persuaded her to testify. He spoke with Cabrera on a couple of occasions and found her to be not credible as a potential witness. He went to the scene of the crime to look for helpful witnesses. He vigorously cross-examined Weems using prior testimony and established a viable defense theory that Weems' testimony was not credible and that Weems was only blaming defendant for the shooting because Weems wanted to get back at defendant for a prior altercation that defendant had with Weems. Therefore, it cannot be found that defendant was denied effective the assistance of counsel on the grounds of a failure by Roby to prepare adequately for trial.

Finally, Roby's waiver of defendant's appearance at the motion in limine hearing did not affect the outcome of the proceedings, and, thus, did not constitute ineffective assistance of counsel. Because an alibi defense could not be presented, inasmuch as Roby did not file a notice of alibi because he did not intend to present an alibi defense, the trial court would have granted the prosecution's motion in limine regardless of whether defendant was present at the motion hearing. Because Roby and defendant discussed that an alibi defense would not be presented, defendant was not prejudiced by being absent from the motion hearing, and, thus, the outcome of the proceedings was not affected by Roby's waiving defendant's presence at the hearing.

Affirmed.

/s/ Hilda R. Gage  
/s/ Patrick M. Meter  
/s/ Karen M. Fort Hood